STATUTE CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 129

GEORGE W. DOUD, DONALD Q. McDONALD, and J. WESLEY CARLSON, Doing Business as BONDIFIED SYSTEMS, and EUGENE DERRICK,

Appellants,

vs.

ORVILLE HODGE, Auditor of Public Accounts of the State of Illinois, et al,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois.

REPLY BRIEF.

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STATEMENT

In 1943, Illinois enacted the Currency Exchange Statute. It was amended in various particulars in 1945, 1947, 1949, and 1951. (Ill Rev. Stat. 1953, Chap. 16½, Paragraphs 30-56.3, Secs. 61-30.)

Sec. 1 (par. 31) defined "community currency exchange" as any person, firm, etc. except State and National banks, engaged at a fixed and permanent place of business, in the business of cashing checks, drafts, money orders or any other evidences of money, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders *under his or their or its name*, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

Sec. 4.1 (par. 34.1) passed in 1951, defined "community", and provided that if the issuance of a license to a community currency exchange would not promote the convenience and advantage of the community in which the business is proposed to be conducted, then the application therefor shall be denied.

Sec. 5 (par. 35) required of currency exchanges the furnishing annually in graduated amounts of performance bonds to the Auditor of Public Accounts for the benefit of creditors of the currency exchange for liability incurred on money orders, or in connection with the rendering of any services performed by the currency exchange.

Sec. 6 (par. 36) required of currency exchanges the

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Appellees do not dispute that the questions presented for review are as stated at pages 2 and 3 of appellants' brief, and appellees do not include in their brief any statement of any other questions as required by the Court's Rule 40; that the propositions stated at pages 10, 11 and 12 and the decisions cited at pages 11 and 12 of appellants' brief are applicable to the questions presented for review is not disputed, and none of those decisions is distinguished, or mentioned, or referred to in appellees' brief; it is not denied that the Act applies to plaintiffs

furnishing to the Auditor of Public Accounts of insurance policies covering the currency exchange against loss by burglary, larceny, robbery, forgery, or embezzlement.

Sec. 8 (par. 38) provided that a currency exchange shall not be conducted as a department of another business, but must be an entity, financed and conducted as a separate business unit.

Sec. 18 (par. 48) defined "fixed and permanent place of business" by requiring a lease of at least 6 months duration, or other suitable evidence of permanency.

The Statute contains a broad, comprehensive plan for the regulation and inspection of currency exchanges from their inception to their dissolution or liquidation, all to the end that the public in dealing with them and transferring funds to them, may be protected against the dishonesty, bad judgment, or misfortune of the currency exchange operators.

The need for such regulation was made clear in *McDougall v. Lueder*, 389 Ill. 141, where the Court in upholding the constitutionality of the 1943 Act against an attack by community currency exchange operators, said, at p. 149:

> "Any business conducted primarily or entirely by accepting the funds of other people, undertaking to keep the funds intact for an indefinite length of time * * * is one in which the public deserves more protection than only the judgment, skill and good luck of the proprietor to protect it against loss."

When it is realized that the volume of money orders, which are usually nothing more than the personal checks of the operators, issued by the 607 licensed community currency exchanges in Illinois, substantially exceeds 400 million dollars annually, the magnitude of the evil sought to be regulated becomes evident.

In 1951, the state legislature added certain findings and declarations embodied in Sec. .01 (par. 30). It found and declared *inter alia:* that the community currency exchange business was affected with a public interest; that no such currency exchange should be operated without a license or otherwise than in accordance with the Act; that the number of such currency exchanges should be limited in accordance with the needs of the communities they are to serve; that it is in the public interest to promote and foster the community currency exchange business and *to assure the financial stability thereof.*

In upholding the validity of Sec. 4.1 (par. 34.2) mentioned *supra*, the Court in *Gadlin* v. *Auditor of Public Accounts*; 414 Ill. 89, said, p. 95:

> "The unrestricted issuance of licenses in a community to the point of saturation would tend to decrease the net earnings of each exchange to the point of insolvency of one or more of the exchanges with the inevitable result of losses to the public."

In the face of such a pronounced state public policy, appellants Doud, McDonald, and Carlson, now seek to nullify it by proposing to establish on a shoestring investment 500 or more agencies in Illinois for the sale of their personal money orders under the name of "Bondified".

It is a fair inference from the evidence that their partnership doing business as Bondified Systems in Illinois is insolvent.

They are operating also a Minnesota corporation in Indiana under the name of Bondified Systems, Inc., where they are doing an annual business in the sale of money orders in the name of the corporation, of $1,400,000, through 120 agencies there; and all that exists in the corporate bank account is $38.10.

The evidence is that the corporation and the partner-

Checks, Inc., of Minneapolis, Minnesota, and (b) the fact that the plaintiffs were licensed, that the plaintiff Derrick was bonded (R. 186-191), and that the plaintiffs Boud, McDonald and Carlson were bonded (R. 147-155, 163, 168).

Appellees contend that by thus using the word "licensed" and "bonded" in this connection, the plaintiffs thereby represented that they held a license from the State of Illinois and were bonded under the challenged statute. There is no evidence that any member of the public purchased a Bondified money order with such understanding, or that any member of the public believed that the words had any such meaning, or that anyone was misled by them. The word "license" means simply permission or authority, and does not mean necessarily government or state authority. *Sinnot* v. *Davenport*, 63 U.S. (22 Howard) 227-240; *Elliott Co.* v. *Lagonda Mfg. Co.*, 205 Fed. 152, 157; *Western Electric Co.* v. *Pacent Reproducer Corp.*, C.C.A. (2), 42 Fed. 2d 116, 118; *Hartford Insurance Co.* v. *Peoria*, 156 Ill. 420, 427. The record shows that Bondified money orders, bearing precisely the same legend, (R. 257) have been, and are being sold in Michigan, where no state license is required to sell money orders (R. 79), and where 2,000,000 Bondified money orders aggregating about $40,000,000 are sold each year (R. 76). There was no evidence that plaintiffs ever attempted, or intended, to represent, or did represent, to any one that they had complied with the challenged statute and there was no evidence that they did not at all times act in entire good faith.

The inferences sought to be drawn from the purported description of appellants' activities, as stated at pages 7 to 10 of appellees' brief, are equally without validity.

The facts are as follows: The plaintiffs Doud, McDonald and Carlson, citizens of Illinois, in 1953 became interested in the sale of "Bondified" money orders, found they could obtain a license from Checks, Inc., the owner of the copyrighted and federally registered service named "Bondified" (R. 39), and organized a Minnesota corporation (R. 40); the corporation applied for a certificate of authority to do business as a corporation in Illinois (R. 40), but because of a "policy" adopted while the chief clerk of the Corporation Department of the office of the Secretary of State was absent in 1944 (R. 85, 126) before the Secretary of State would issue such certificate of authority it was necessary to get from the State Auditor a letter of "clearance". This "policy" did not extend to other corporations such as brokerage houses or real estate concerns that would have to have a license before they could operate (R. 85). The plaintiffs then changed the name of their corporation to Bondified Systems, Inc. and obtained a license for it to operate as a corporation in Illinois by providing that the corporation would not engage in business in Illinois as a currency exchange (R. 41, 127). They then proceeded to operate the business of selling money orders as a partnership, leased certain premises in Chicago (R. 134-B), took an assignment from the corporation to the partnership of the license from Checks, Inc. (R. 42), and entered into an agency agreement with the corporation whereby the partnership would conduct operations for the corporation in northern Indiana (R. 169, 172). The plaintiffs Doud, McDonald and Carlson entered into a deposit agreement with a Chicago Bank (R. 157), executed other instruments required by that agreement and their license agreement and licensed the plaintiff Derrick as their agent (R. 182). Derrick notified the appellee Hodge by registered letter (R. 88, 247)

that he had received the agency, that he claimed that the Community Currency Exchanges Act of Illinois violated his constitutional right to operate a legal business and that he intended to commence the sale of Bondified money orders as soon as he received his supplies. The answer admits that the defendants have "threatened to enforce the said statute against the plaintiffs if the latter violated the same" (R. 29). Derrick received his supplies and proceeded to sell Bondified money orders (R. 224, 225), and to make reports and remittances to the plaintiffs Doud, McDonald and Carlson (R. 226, 227), and the money orders were paid out of the bank account in which the remittances were deposited (R. 224-243), and the plaintiffs filed this suit.

It is submitted that the appellees have not cited any authority to support the contention that before challenging a state statute in the federal courts plaintiffs must first exhaust their remedy in the state courts, when prosecuting officers have threatened, and if not enjoined, will prosecute them unless they comply with an unconstitutional law relating to their business, and withdrawal from further business until a test case is taken through the state courts, and perhaps to this Court, would result in a substantial loss of business for which no compensation could be obtained. There is the imminence of irreparable injury justifying the exercise of federal equity jurisdiction.

Respectfully submitted,

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Counsel for Appellants.